No. 13,057

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES C. GIBBS,
Libelant-Appellant,

vs.

THE UNITED STATES OF AMERICA,
Respondent-Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

CLOSING BRIEF OF APPELLANT.

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I. REPLY TO APPELLEE'S "STATEMENT OF FACTS".

A. "Soit Droit Fait al Partie."

Appellee's "statement" (Ap. B. 4) develops a "cloak and dagger" explanation of why the Government's negligence must forever be shrouded in silence. No such "explanation" appears in the record. We were not advised in the trial court that "the government concluded that the national interest would best be served by not attempting a trial of that issue", nor that the final concession regarding the applicability of the *res ipsa loquitur* doctrine was "pursuant settled policy in such situations".[1] In its answer, filed some *six months* after the filing of the libelant's libel, it specifically denied negligence and would not admit an explosion had occurred (R. 5, 8). The libel-

[1]Government Brief, p. 5.

ant was put to his proof that an explosion had occurred. No request for closed hearing was made by the Government. At no time was the court impressed with the necessity for secrecy in the testimony of libelant regarding the cause of his injury. The fact of the explosion was reported in the daily press. There is nothing in the record to indicate that any "concessions" were made regarding the liability of the Government. It made no formal offer to stipulate its liability. Libelant argued the applicability of the doctrine which established his prima facie case. The Government offered *nothing* in rebuttal.

We desire to give no comfort to the enemy nor to affect the national security. However, we do *not* feel that the circumstances of the explosion necessarily involved the national security in this instance. Regrettably, whatever comfort was gained by the enemy in the knowledge that an aircraft carrier was the scene of an explosion during its overhaul, was a matter of public knowledge. Again, if the incidents of the explosion "would not admit of full disclosure",[2] then these incidents were known fully to the appellee, and if knowledge of the real cause of the explosion indicated liability, the entire matter could have been disposed of preliminarily by an admission of *that* fact with the further assertion of its special defenses, if any. *Public security does not require that a proper claimant be deprived of existing rights.*

In its brief, at page 11, the Government attempts to fortify its position by making reference to *Mandel v. United States,* 74 Fed. Supp. 754,[3] wherein default judgment was entered against the United States for its failure to obey order of the court for the production of the record of the Board of Investigation regarding the casualty involved. *The record in this case involves no such element.* The Government, in its brief filed in the matter of

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[2]Government Brief, p. 5.

[3]Reversed 191 F. (2d) 164, certiorari granted, January 2, 1952.

United States of America v. Vatuone, C.C.A., 9th, No. 12,906, at page 18, and making specific reference to the Gibbs case, admits that fact:

> "The manner of the deaths and injuries in the present cases *appears to involve no matter of the functioning of defense installations on army and navy craft nor of the military decisions of the superiors of the army and navy personnel involved.*" (Emphasis added.)

Thus, the Government, in the one brief (Gibbs), argues that matters touching upon national security are involved, while in the other *(Vatuone),* admits *that no such consideration is before the court.* The opinion of the District Court herein held that the libelant Gibbs did have an election of remedies. What the Government now is suggesting is that this election should be destroyed by virtue of their claim of "privilege", asserted for the first time on appeal. If the Government has consented to be sued, *it is in the same position as a private person.*

This problem has oft been presented to the courts. In *Bank Line v. United States,* 76 Fed. Supp. 801, 804, the court, appreciating the problem, stated:

> "The Government cannot be made a party defendant without its consent; and I assume that the Government could have annexed to its consent an absolute privilege of non-disclosure of information in its possession. To the extent that it would have made the assertion of some claims against the Government futile, it would amount to a constriction of the scope of the Government's consent * * * Congress has not here so circumscribed its consent to be sued. 46 U.S. C.A. Sec. 741, 742, 743, 781, 782. On the contrary, Sec. 743 directs that the principles of law and the rules of practice obtaining between private parties shall prevail. The consent, being general, amounts to an endorsement of the libel with the sovereign's command 'Soit droit fait al partie' (Let right be done to the party). But right cannot be done if the Government is allowed to suppress the facts in its possession."

The court properly points out:

> "It seems to me that two public interests are here in conflict. The first is that justice shall be done between the litigants."[4]

B. Government's attack on District Court opinion unsupported in record and violates rules on appeal.

Appellee at page 8 of its brief states:

> "Relying on the *rule* that the successful party may not appeal but is entitled to urge any ground in support of the *correctness* of the decision, although rejected by the court below, the United States, having been successful and *having nothing to appeal from,* took no appeal from the District Court's refusal to hold appellant's compensation, paid leave and retirement rights exclusive or to apply the *fellow servant doctrine.*" (Emphasis added.)

Analysis of this statement indicates the Government's position to be (a) that there exists a *rule* in support of its contentions, (b) that it is urging grounds in support of the correctness of the decision in the District Court, (c) that it had nothing to appeal from, (d) that it raised the "fellow servant doctrine" as a defense below and that it was rejected.

Let us first examine the so-called "rule". Appellee cites four cases in its support (page 8, fn. 3). Examination of these authorities convinces that but one of these is in any sense pertinent, *U. S. v. Amer. Ry. Exp. Co.,* 265 U.S. 425, 436. Yet, even this authority does not support appellee's flat statement of a so-called "rule". The decision states in its relevant part:

> "It is true that a party who does not appeal from a final decree of the trial court cannot be heard in op-

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[4]The court further added: "It seems to me but a short step and a necessary one from these premises to the argument that where the Government is the complainant in a civil suit for damages, it should likewise be required to make its own choice—to resolve on its part which of two conflicting public interests it prefers in any particular instance."

> position thereto when the case is brought here by the appeal of the adverse party. In other words, the *appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary*, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. But it is likewise settled that the appellee may, without taking a cross appeal, urge *in support* of a decree ANY MATTER APPEARING IN THE RECORD although his argument may involve an attack upon the reasoning of the lower court, or an insistence upon matter overlooked or ignored by it." (Citing cases.) (Emphasis added.)

There is but one matter properly argued in the Government's brief in actual *support* of the decree of the District Court, i.e., the effect of the acceptance of hospital and medical benefits in determining appellant's right to proceed under the Public Vessels Act.

However, it has now introduced *for the first time* its contention that the "fellow servant rule" bars appellant's recovery. This was *not* a matter which was before the District Court. It was not argued therein nor presented as one of the issues. There is *absolutely nothing in the record* to indicate that such a defense had been interposed or offered as a basis for the denial of liability.

Appellee's present argument, that rights under the FECA are exclusive, cannot conceivably be "in support of the correctness of the lower court decision" and certainly *constitutes attack upon it!*

The District Court opinion left no doubt that it assumed jurisdiction under the Public Vessels Act and declared the availability to appellant of an "election of remedies". The opinion has been widely cited, since its publication, in support of the doctrine that a shoreside civilian employee of the United States (at least prior to the amendments of October, 1949) had an election of remedies and was

not limited to his rights under the FECA. The Government must have its tongue in cheek when it states "it had nothing to appeal from" since it has consistently urged in our Federal courts throughout the United States that the FECA is the exclusive remedy of civilian workers of the United States, whether seamen or shoreside employees.[5]

Not only was there a failure to raise the alleged defense of "fellow servant" in the court below, but the Government *specifically denied any fellow servant was involved in the injury to appellant.* It set forth in its answer (R. 11) the following distinct defense:

> "* * * That *none of the injuries* or damages claimed to have been sustained by libelant *was the result of any carelessness or negligence on the part of any of the officers, representatives, agents or employees of the United States of America,* nor were the said injuries or damages sustained by reason of any insufficiency or unseaworthiness on the part of said vessel." (Emphasis added.)

Admiralty Rule 6 of this Honorable Court states:

> "Upon sufficient cause shown, this court, or any judge thereof, may allow either appellant or appellee to make new allegations, or pray different relief, or interpose a new defense, or make new proofs. Application for such relief may be made at any time after the perfecting of the appeal to this court, and *within fifteen days after the filing in this court of the apostles* and upon at least five days' notice to the adverse party or his attorney of record." (Emphasis added.)

Admiralty Rules 7 and 8 set forth the manner in which such procedures are effected. The Government has taken none of these steps and now offers argument *in alleged*

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[5]Mandel v. United States, 191 F. (2d) 164; *Johansen v. United States,* 191 F. (2d) 162; *Canon v. United States,* 188 F. (2d) 444; *Brady v. Roosevelt S.S. Co.,* 317 U.S. 575; *Dahn v. Davis,* 258 U.S. 421, are but a few.

support of the correctness of the lower court decision by raising for the first time the issue of the applicability of the "fellow servant rule" and challenging the correctness of the lower court's decision of November 30, 1950, in which it clearly stated one of the issues to be: "Was the FECA the exclusive remedy of the libelants?" The court's decision on this issue is unequivocal.

> "It is my conclusion that *the compensation statute was not the exclusive remedy* of the libelants in these cases." (R. 16.)

It is reasonable to conclude, therefore, that the Government is estopped presently to interpose the defense of the alleged "fellow servant rule", or to attack the decree "with a view to enlarging its own rights thereunder, or of lessening the rights of its adversary".

II. THE FECA WAS NOT THE EXCLUSIVE REMEDY AVAILABLE TO SHORESIDE CIVILIAN EMPLOYEES OF THE UNITED STATES PRIOR TO THE AMENDMENTS OF 1949.

Appellee, without having appealed therefrom, attacks the opinion of the District Court (R. 12), which held that the appellant had an election of remedies and that the Court did have jurisdiction under the Public Vessels Act.[6]

In its brief, at page 9, it conjures up a "majority rule", based upon the four cited cases. Admittedly, *Mandel v. United States,* 190 F. (2d) 22, and *Johansen v. United States,* 191 F. (2d) 164 (a split two to one decision), hold the civilian seaman's remedy exclusive under the FECA. Certiorari was granted January 2, 1952. The third citation of authority, *Posey v. Tennessee Valley Authority,* 93 F. (2d) 726 (often cited on this point and just as often rejected), is hardly authoritative nor indicative of a

[6]In support of its contentions it incorporates its brief in *U.S. v. Vatuone* (CCA 9th No. 12906).

"majority rule" and is, as the Honorable District Judge declares, "a decision based entirely on features of the Tennessee Valley Authority Act which have no analogy in other statutes here under consideration."[7]

The fourth case, *Lewis v. United States* (D.C. Cir., 1951), 190 F. 2d 22, was decided after the passage of the amendments to the FECA of October, 1949, and is therefore inapplicable on the facts.

Thus, the alleged "unanimity of decision" becomes elusive when the authorities are examined, and what we do find is *a majority of opinion to the contrary.*

Citing *Dahn v. Davis,* 358 U.S. 421, the Government, through tortuous misconstruction and by employing strange legal forceps to extract a meaning obviously offensive to the context, cites the case as holding that compensation was the petitioner's sole and exclusive remedy (Vatuone Brief, page 47). Far from holding what the Government desires to read into the opinion, Mr. Justice Clarke clearly stated at page 428:

> "This reference to the two acts shows that the petitioner had two remedies, each for the same wrong and both against the United States, and therefore the question for decision takes the form, may the petitioner *after having pursued one of his remedies to a conclusion and payment pursue the other for a second satisfaction* * * *"

In *Brooks v. United States,* 337 U.S. 49, two army servicemen, while on leave, were struck by an army truck driven by a civilian employee of the Army. The Supreme Court held that the injured Army men had the right to bring an action under the Federal Tort Claims Act (28

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[7]The Federal statute, creating the Authority, made the FECA exclusive. There being no other statute, by which the Government had consented to be sued for such injuries, the remedy under the FECA was held exclusive. At the time, the Federal Tort Claims Act had not yet been adopted by the Congress, and the Public Vessels Act could not apply.

U.S.C.A. 1948 ed. 2671), and that this right is in addition to all other rights enacted for the benefit of servicemen. In analyzing all relevent legislation, the Court again pointed out that the remedy under the FECA is elective, and not exclusive as here contended by the Government.

In *Brady v. Roosevelt Steamship Co.,* 317 U.S. 575, the suit was by a United States customs inspector for an injury sustained on a government owned vessel. The court held that the petitioner, a civilian employee, had the right to sue the United States under the Suits in Admiralty Act.

In *Panama R. Co. v. Minnex,* 282 Fed. 47 (CCA 5th), an injured employee of the Panama Railroad Company, which was wholly owned by the United States, was held to have an election between the FECA and a suit for damages against the United States.

This court in *Canon v. United States,* 188 F. (2d) 444 (CCA 9th), recognized the right of a civilian employee of an Army hospital to an election beween rights under the FECA and the Federal Tort Claims Act. The court, through Justice Healy, stated:

> "In a supplemental memorandum the government argues that the remedy provided by the Federal Employee's Compensation Act is exclusive if appellant elected to receive the benefits of the Act, 5 U.S. C.A. Sec. 751 et seq., citing *Parr v. United States,* 10 Cir., 172 F. (2d) 462. Counsel says that by accepting the hospitalization, she accepted the Act's benefits. The *Parr decision relied on is express authority for the proposition that a person in appellant's situation has two remedies against the United States for the same wrong,* one under the Employee's Compensation Act and the other under the Tort Claims Act, and that he has the option to select either remedy, but cannot pursue both. See also Dahn v. Davis, 258 U.S. 421 * * *" (Emphasis added.)

The court, in *White v. U. S.,* 77 F. Supp. 316 (D.C. New Jersey), declared the plaintiffs had an election of

remedies between the FECA and the Federal Tort Claims Act. Although the Government here argues that the Second and Third Circuit decisions represent "unanimity", it is interesting to note the court's observations in the instant case:

> "The defendant [U. S.] concedes that there are cases holding that the Federal Employee's Compensation Act is not an exclusive remedy where a civil employee of the United States is injured while acting within the scope of his employment. *Panama R. R. v. Strobel,* 5 Cir., 282 F. 52; *Panama R. R. v. Minnix,* 5 Cir, 282 F. 47; *Payne v. Cohlmeyer,* 7 Cir., 275 F. 803.[8]

In *Frader v. United States,* 91 F. Supp. 657 (D.C. S.D. NY.), involving injury to a civil service employee of the United States, the court held:

> "It may be assumed that libelant *could have brought a suit against the United States* under the Public Vessels, Act, even though he was within the coverage of the Compensation Act. *Mandel v. U. S.,* D.C., 74 F. Supp. 754; *Johnson v United States,* 89 F Supp 65, Cf. *Jentry v. United States, D.C.,* 73 F. Supp. 899. Having *filed a claim* under the Compensation Act, and accepted compensation, he *elected* his remedy * * * (citing cases)." (Emphasis added.)

Cases have been decided in this Ninth Circuit without any discussion by the court of the effect of the FECA. *McInnis v. U. S.,* 152 Fed. (2d) 387; *United States v. Loyola,* 152 Fed. (2d) 126; *Thomason v. United States,* 184 Fed. (2d) 105.

Clearly, the conclusions reached in the *Johansen* and *Mandel* cases (supra) are not only in conflict with the

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[8]*Panama R.R. v. Strobel* (supra) involved injuries to a United States Marshal injured on the Panama Railroad. *Payne v. Cohlmeyer* (supra) held that while an employee may elect to take under the Compensation Act, he is not required so to do.

decisions of the Fourth and Ninth Circuits,[9] but are also in direct opposition to the rulings of the United States Supreme Court.[10]

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[9]*Johnson v. United States,* 186 Fed. (2d) 120 (CCA 4th), and followed in *United States v. Loyola,* 161 Fed. (2d) 126 (CCA 9th). See also: *United States v. Marine,* 145 Fed. (2d) 456 (CCA 4th), wherein a United States Customs Inspector was injured in the discharge of official duties while leaving a merchant vessel owned by the United States. The Court of Appeals for the Fourth Circuit denied the contention that he was limited to the remedy under the FECA and held that he had an election to accept benefits under that Act or to bring an action for damages under the Suits in Admiralty Act.

[10]Counsel for appellant in the *Mandel* case, in his Petition for Certiorari, states:

> "The Court in the *Mandel* case (supra) did not render any analysis of the Statutes involved or of their legislative history, in making its interpretation, but relied upon what it deemed to be considerations of fairness and national security. Had the Court rested its decision upon the plain language of the Statutes and expressed Congressional purpose, a different conclusion would have been reached."
>
> "The first authoritative expression was rendered in *Brady v. Roosevelt S.S. Co.* (supra), where an examination of the Suits in Admiralty Act was made, and the Court expressly stated that a right of action was given under that Act to a government employee injured on a government vessel. A comprehensive analysis of the legislation is set forth in the opinion of Chief Judge Groner in *United States v. Marine* (supra). Judge Groner first adverted to the Supreme Court's decision in the Brady case and then proceeded to make his own analysis of the Suits in Admiralty Act as follows:
>
> > '* * * we have no manner of doubt from the plain words of the statute, considered in the light of the ordinary rules of construction, that we are required to reach the same result. In substance, the provision in question is that whenever a proceeding in admiralty could be maintained against a privately owned and operated vessel, a libel in personam may be brought against the United States in the operation of its merchant fleet. We are not at liberty to alter or add to the plain language of the statute to effect a purpose which does not appear on its face. There is certainly no suggestion in this language, or in any other language of the Suits in Admiralty Act, *which implies that the right is limited to persons outside the provisions of the Employee's Compensation Act, and it is a fair inference that if Congress had intended that result it would have said so in unmistakable terms. The fact, of course, is that the inference is directly the other way.*' " (Emphasis added.)

Indeed, the Congress of the United States recognized that the FECA was *not* an exclusive remedy by its passage of the 1949 Amendment to the Act, providing that it should *henceforth* be exclusive. Unless we are to attribute to Congress the performance of nugatory acts, we must conclude that an injured government employee had an election of remedies prior to the 1949 Amendment to the FECA.[11]

III. APPELLANT'S ACCEPTANCE OF MEDICAL BENEFITS AND ACCRUED SICK LEAVE DID NOT CONSTITUTE AN ELECTION TO PROCEED UNDER THE FECA.

The Honorable District Judge, in his opinion of November 29, 1950 (R. 18), stated:

> "The case of *Gibbs v. United States* poses a somewhat different problem. Gibbs received certain benefits under the FECA, namely, medical and hospital attention. *He did not apply for nor did he receive any compensation payments* * * *" (Emphasis added.)

The Government, in its brief, page 13, now suggests to this Court that (a) application for *compensation* was made *in behalf* of Mr. Gibbs "in accordance with law", (b) that this "application" was ratified by acceptance of medical benefits. The District Judge was under no such illusion.[12] The plain fact is, appellant *neither applied for*

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[11]In *United States v. A. J. Woodruff Co.*, 175 Fed. 776 (CCA 2nd), the court, interpreting a section of the Tariff Act, stated:

> "A statutory provision, the meaning of which is not clear, should, of course, be construed with reference, not only to the whole statute, but to contemporaneous and even subsequently enacted statutes in pari materia. *Where, as in this case, the statute repeals or replaces an earlier law, any change of language is more consistent with a change of intent than with the purpose of defining or declaring the meaning of the language of the earlier repealed statutes.*" (Emphasis added.)

[12]The District Judge, in his opinion of February 13, 1951 (R. 24), explaining the reasons for additional hearings in the Gibbs matter, stated:

> "It (the Court) did so because libelant Gibbs, *unlike* the other libelants in the consolidated cases, *received no monetary* compensation under the FECA, but only medical and hospital attention."

nor accepted compensation for *his disability;* he took none of the steps required for such application (see our Opening Brief, pp. 11-14).

It is also argued (page 13) that when appellant chose to return to work with cast and crutches rather than remain hospitalized, and was granted accumulated and advance sick leave by his department head, he was, at once, receiving benefits allegedly flowing from the FECA. This, too, is a misinterpretation and finds no support in the applicable statutes.

The right to sick leave does not flow from the FECA. Its authorization is found in Title 5, U.S.C.A. Sections 30 et seq., as amended March 4, 1936.[13]

It is adequately clear from the very wording of the FECA that the employee by using accrued sick leave, is *not* receiving compensation under the Act.

Title 5, U.S.C.A. Section 758, provided, prior to the amendments of 1949:

> "If at the time the disability begins the employee has annual or sick leave to his credit he may, subject to the approval of the head of the department, use such leave until it is exhausted, *in which case his compensation (i.e. his disability payments)* shall begin on the fourth day of disability after the annual or sick leave has ceased." (Emphasis added.)

Under this section, an employee, using the sick leave granted him as aforesaid, *is not, in fact, receiving compensation for his disability.* On the contrary, his compensation, if any, starts *only after the sick leave has been exhausted.* This sick leave is cumulative. It is in a less formal sense a deposit against a rainy day upon which he may draw in the event of illness or other family emergency. It is granted to him as part of his service to the

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[13]Section 30h; advancement of sick leave; administrative officers may advance thirty days' sick leave with pay beyond accrued sick leave in cases of serious disability or ailments when required by the exigencies of the situation.

Government. It is for that very reason that he generally works at a wage less than those common in the industry for similar services. It is, in the best sense, an appreciation for his measure of devotion. It must necessarily be beyond the Congressional concept to hold that the use of his accumulated sick leave deprives him of his right to compensation for his disability and destroys his election of remedies.

A realistic analysis of the pertinent language of the FECA must lead to the conclusion that what the government employee actually has is a twofold benefit:

(1) He has a right in the event of his illness, to hospital and medical care. This right is his whether he is disabled or not.[14]

(2) If the employee is disabled, he is entitled to disability payments, as *compensation* for his injury.

It must logically follow that the mere acceptance of medical benefits cannot be construed as an *election* to receive *disability compensation under the FECA.*[15] Since

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[14]Title 5 U.S.C.A. Sec. 759 provided, prior to the amendments of 1949:

> "Immediately after an injury sustained by an employee while in the performance of his duty *WHETHER OR NOT DISABILITY HAS ARISEN* and for a reasonable time thereafter, the United States *shall* furnish to such employee reasonable medical, surgical and hospital services and supplies unless he refuses to accept them." (Emphasis added.)

The court's attention is further invited to pages 12 to 14 of appellant's opening brief, in which other pertinent statutory regulations are cited, in amplification of this particular point.

[15]At page 13 of its brief, the Government cites 71 *C.J.*, p. 1488, and from it extracts a flat statement, which is not supported by the case cited as authority for the main declaration. *Talge Mahogany v. Burrows* (1921), 191 Indiana 167. Here, plaintiff brought a common law action against his employer. The latter had permitted his insurance to lapse. Following injury to the plaintiff, the defendant employer furnished the plaintiff with medical care and drugs. The trial court instructed the jury that it was not to consider the acceptance of medical care and drugs in determining whether or not there had been an election to proceed under the Indiana Workmen's Compensation Act. The Appellate Court's sole holding as to this point is simply that the jury had a right to consider the acceptance of these benefits and that the lower court in-

at the time that the medical relief is given there is, generally, no way of knowing whether the employee is disabled and qualified to receive disability compensation under the Act and if, in fact, following his medical care or hospitalization, there is no disability sufficient to deter him from his daily work, he has no claims, and he receives no disability compensation.

This dichotomy is further supported by the definition of "compensation" appearing in 5 U.S.C.A. 790(h):

> "The term 'compensation' includes the money allowance payable to an employee or his dependants and other benefits paid for out of the compensation fund, *Provided, However, that this shall not in any way reduce the amount of the monthly compensation payable in case of disability or death.*" (Emphasis added.)

Although medical benefits fall within the definition of "compensation" since they are paid out of the compensation fund, *these benefits are not compensation for the disability* because of the provision that they "shall not in any way reduce the amount of the monthly compensation payable *in case of disability or death.*"

In amplification of the matters presented in our opening brief, pages 14 to 16, we urge that a realistic analysis of all the relevant statutory and administrative regulations impels the conclusion that had the appellant elected to proceed under the FECA, he could have received full compensation for his disability[16] without any reduction for the medical benefits theretofore received. *However, he did not so elect and did not receive any disability compensation. Contrariwise, he chose to pursue an established remedy under the Public Vessels Liability Act.*

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struction was to that extent erroneous. However, we cannot agree that this case, decided in the Indiana courts in 1921, is authority for the flat assertion of the theory announced in Corpus Juris that the acceptance of medical benefits is in and of itself an election of remedies.

[16]Mr. Gibbs returned to work on crutches and in a cast but was incapable of attending upon his job as a shipfitter, and his reason

IV. WE REPLY TO APPELLEE'S ASSERTION OF THE "FELLOW SERVANT RULE".

A. Appellee is estopped from raising this issue on appeal.

We have presented (supra par. I. B.) sound reason and authority, precluding appellee from raising the "fellow servant" issue on appeal for the first time. The record before this court (which appellee has not sought to amplify) demonstrates conclusively that the defense of "fellow servant" was neither raised, argued, urged or insinuated in the lower court.

Without waiving our objections, we urge that the presentation of this untimely defense is, with considerable premeditation, double barreled and calculated to impress this Honorable Court with the alleged dire dilemma of the Government in these situations. It is argued: (a) public security forbids disclosure of the fact; (b) liability must be "conceded"; (c) the Government is left helpless; therefore civilian shoreside government employees and others must be restricted to their rights under the FECA.

We know of nothing in the record to indicate that the public security was threatened nor that the Secretary of the Army or Navy passed upon the precise requirement that in this particular case, dire consequences would ensue if the results of a Board of Inquiry should be produced and submitted to the court for determination. No formal claim of privilege was made.

What appellee *now* argues is this: the explosion was brought about through the negligence of a fellow servant, but we could not show that fact in the court below because it would require disclosure of secret information. It then asks this court to assume (a) that the information, if produced, would have affected national security and (b) that the explosion occurred because of the negligence of a "fellow servant" *of the libelant* then and there employed at the time of the explosion. The explosion could conceivably have been caused by the negli-

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for doing so was: "I would much rather be doing something than sitting around in a cast." (R. 81.)

gence of persons *other* than fellow servants of the libelant. The Government was in the best position to know the real facts of the explosion. Suffice it to say that appellee has failed to raise or prove this now asserted defense. Its assertion, under the circumstances, is virtually frivolous.

B. The fellow servant defense is, in any event, inapplicable.

Appellant's injury was unquestionably caused by an explosion aboard a vessel owned, operated, managed and controlled by the Government. It requires no profound thought to realize that appellant *had not been furnished* with a safe place in which to work, and that the Government was obviously negligent in failing to provide such a place for him. Appellee has furnished us with the case of *So. Ry. v. Taylor,* 16 Fed. (2d) 517. There the court held:

> "While it is a general rule that employees entering the service of a common master become engaged in a common service and are fellow servants, there are duties imposed upon the master which he cannot ignore and still claim immunity under the fellow servant doctrine; for example, *he must provide his employees with a reasonably safe place in which to work* and reasonably safe tools, appliances and machinery for the accomplishment of the work. He must employ reasonably competent employees to perform the respective duties to which they are assigned, and in some of the states it has been held that the master is obliged to adopt and promulgate safe and proper rules for the conduct of the business."

We reiterate that in order to rely upon the fellow servant doctrine, the burden of establishing the cause of appellant's injury was upon the appellee-Government. What *is* known is that there was an explosion followed by injury.

The entire legislative and judicial history of the concern by the Congress and the courts for the protection of seamen, *and others* engaged in maritime duties, indicates an intent to enlarge, rather than to limit, the obli-

gations of shipowners to members of the crew and others engaged in maritime pursuits.

In some aspects of the maritime law, there has been developed an absolute duty from the shipowner to his employees covering all within the range of the humanitarian policy. *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 94.[17]

Because of the hazards of maritime duty, the Acts (cited below) deny the employer the right to rely on the defense of fellow servant.

The Government argues that an action by a shoreside repairman, brought under the Public Vessels Act, cannot be sustained because the defense of fellow servant is available to it. Basically, it contends that such shoreside workers are not "seamen" within the meaning of the Jones Act; that they are excluded from the coverage of the Longshoremen's and Harbor Workers' Compensation Act and are left naked of any rights except those available under the FECA.

Thus, the shoreside Government employee has been singled out to be excluded from the "humanitarian policy" offering protection to maritime workers generally. It will be noted that according to the Government, *not all shore-*

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[17]The various statutes, and their coverage, are reflected in the following:

(1) *Jones Act,* 46 U.S.C.A. 688—which made the FELA available to seamen:

(a) Stevedores are within the coverage of the Act. *International Stevedoring Co. v. Haverty,* 272 U.S. 50; *Buzinski v. Luckenbach S.S. Co.,* 277 U.S. 226.

(b) Claims against the United States under the Jones Act may be enforced through the *Suits in Admiralty Act,* 46 U.S.C.A. 741-752, or the *Public Vessels Act,* 46 U.S.C.A. 781-790; *American Stevedore v. Parello,* 330 U.S. 446; *Canadian Aviator Ltd. v. U.S.,* 324 U.S. 215; *Mejia v. U.S.,* 152 Fed. (2d) 686; *Lauro v. U.S.,* 162 Fed. (2d) 32; *Thomason v. U.S.,* 184 Fed. (2d) 105.

(2) *Longshoremen's and Harbor Workers' Compensation Act,* 33 U.S.C.A. 903—stevedores, longshoremen and shoreside repairmen are covered by this Act (it specifically excludes from its coverage employees of the United States).

side repairmen are excluded but only those employed by the United States.

As Justice Holmes said in *International Stevedoring Co. v. Haverty* (supra):

> "We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties *to vary with the accident of their being employed by a stevedore rather than by the ship.* The policy of the statute (the Jones Act) is directed to the safety of the men and to treating compensation for injuries to them as properly part of the cost of the business. If they should be protected in the one case, they should be in the other."

Like Justice Holmes, "we cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by * * *" the Government rather than by a private concern, for wherever the Government has consented to be sued, it stands in the position of a private employer.

Injuries to shoreside employees (in cases arising before the 1949 amendments) should, under the humanitarian policy, be compensable in accordance with the election of the injured employee—an election which the District Judge said was available here to the appellant. The circumstance of appellant's being employed by the Government should not permit the latter to escape liability by relying on the now almost antiquated fellow servant doctrine.

V. CONCLUSION.

A. The District Court opinion, supported by the weight of authority and by Congressional action, properly concludes that appellant had an election of remedies. The Government's argument that the FECA is the exclusive remedy of a shoreside civilian employee of the United States is untenable.

B. A careful analysis of the applicable statutes conclusively establishes that the acceptance of accrued sick leave and medical benefits does not constitute an election to proceed under the FECA. The right to sick leave does not flow from the FECA, and medical benefits are not "compensation" for the disability.

C. The Government's argument that the causes of and the circumstances surrounding the accident must necessarily be shrouded in silence, because of an alleged threat to public security, is equally untenable, for reason that the record fails to support this contention, and there is no requirement that considerations of public security shall preclude a proper claimant from a just recovery.

D. The Government is precluded from attacking the judgment of the court below without having taken appeal therefrom.

E. Appellant falls within the range of the humanitarian policy extended by the courts and Congress to those engaged in maritime pursuits, and the fellow servant doctrine is therefore inapplicable to those in appellant's position.

F. The Government is estopped from relying on the fellow servant defense, for reason that it has failed to assert it in its pleadings or in the court below, and the record is devoid of any evidence to sustain this untimely contention.

For the foregoing reasons, appellant respectfully submits that the order and decree of the District Court adjudging an election of remedies to have been made be reversed and the case remanded to the trial court for the sole purpose of determining damages.

Dated, San Francisco, California,
February 11, 1952.

Respectfully submitted,
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Proctors for Libelant-Appellant.